Filed 11/9/16 In re M.M. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re M.M., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Appellant, v. M.M., Defendant and Respondent.	E064843 (Super.Ct.No. SWJ1200176) OPINION

APPEAL from the Superior Court of Riverside County. F. Paul Dickerson III, Judge. Affirmed.

Michael A. Hestrin, District Attorney, Emily R. Hanks and Kirsten E. Seebart, Deputy District Attorneys, for Plaintiff and Appellant.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Respondent.

The People appeal from the juvenile court's order granting defendant and respondent M.M.'s motion to dismiss a subsequent petition pursuant to Penal Code[1] section 654 and *Kellett v. Superior Court* (1966) 63 Cal.2d 822 (*Kellett*). For the reasons explained *post*, we affirm the juvenile court's order.

I

FACTUAL AND PROCEDURAL BACKGROUND[2]

On February 6, 2015, deputies responded to a residential burglar alarm located on Heron Way in the city of San Jacinto. When the deputies arrived, the homeowners, Wayne S. and Peggy L., reported a burglary had occurred in their home and that several pieces of jewelry, car keys, and an iPad had been stolen.

On February 12, 2015, Peggy contacted the police after she received an email notification her stolen iPad had been turned on and was located in the area of 2118 Possum Court in the city of San Jacinto. The location was not an exact address, but tracking information from the iPad showed the device somewhere near that location. Deputies responded to the 2118 Possum Court address and determined the iPad was not at that residence.

The deputies then investigated the residence directly south of that location, 2114 Possum Court, where M.M. (minor) resided. Minor's mother spoke with the deputies, and informed them that minor had been in trouble with the law before and that

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[1] All future statutory references are to the Penal Code unless otherwise stated.

[2] The factual background is taken from the probation officer's reports.

he had a pending burglary case in San Bernardino. Minor's mother gave the deputies consent to search the residence, including minor's bedroom. The deputies found a pile of jewelry under minor's bedsheets, and two sets of Jaguar vehicle keys on his bed. Underneath minor's bed, the deputies found a gray iPad case, but no iPad. The deputies found more jewelry in a bag of trash near minor's bedroom closet and a gold ring with a red stone and a pair of earrings in a pile of dirty clothing near the bedroom door.

While in minor's bedroom, a deputy called Peggy. Peggy described the gold ring with the red stone and the Jaguar keys as some of the items stolen from her burglarized home. Minor was thereafter arrested and taken into custody. After minor waived his rights, minor explained that earlier in the day his friend, "Shawn," arrived.[3] Shawn was wearing a backpack and told minor he " 'came up on something and wanted to use his Wi-Fi to connect to the internet.' " Minor and Shawn then went into his bedroom where Shawn emptied the backpack. The contents of the backpack included an iPad and jewelry. Shawn turned the iPad on and they heard a " 'beeping' " sound. Shawn realized the iPad was being tracked, turned off the device, and walked out of the bedroom with it. Shawn told minor he would return for the jewelry and left his residence. Minor admitted that he thought the property was stolen. The total value of the recovered stolen items was $2,070.

[3] There was no other information listed for "Shawn" in the police report other than his first name.

The deputies contacted Wayne and Peggy, who identified all the property found in minor's bedroom as property taken during the burglary of their residence. Peggy also reported that her neighbor had cameras on his property, and one of them faced their residence. The video showed three males exit a vehicle, approach the front door of Peggy's residence and attempt to kick the door in. When that did not work, the three males went to the side of the house and entered through a back window. Peggy did not believe minor merely received stolen property but that he was one of the three juveniles involved in burglarizing her home. The three males also cut the power to her fuse box to prevent the burglar alarm from going off. Peggy further stated that her husband saw minor looking at their Jaguar vehicle three months prior, and overheard him ask a friend how much he thought he could get from stealing it.

On February 13, 2015, a petition was filed charging minor with felony receiving stolen property exceeding $950 (§ 496, subd. (a)) (Petition 1).

On February 17, 2015, minor waived his constitutional rights and admitted the allegations in the petition. At that time, Wayne and Peggy addressed the court. In relevant part, Wayne stated, ". . . I've seen the gentleman before . . . . [¶] . . . [¶] There's a camera. Our neighbors have cameras of them breaking in, and two of them are out there." Peggy, in pertinent part, informed the court that she had seen minor in the neighborhood casing their car before. She further said, "[Minor] has come up to us at the front door before. [¶] We see in the videotape of the three men breaking into our home,

and then him [minor] having our things in his home . . . . [¶] . . . [¶] . . . [W]e have a few things, and he just came and took them."

The dispositional hearing was held on March 3, 2015. At that time, minor was declared a ward of the court and placed on probation on various terms and conditions, including serving time in juvenile hall.

Approximately five months later, on August 4, 2015, a second petition was filed charging minor with residential burglary (§ 459) (Petition 2).

At a hearing on September 2, 2015, Riverside County Sheriff's Department Corporal Joshua Cadenhead testified that the residential burglary of Peggy and Wayne's home occurred on February 6, 2015; and that latent fingerprints had been found on a broken window at the burglarized home. The fingerprints were submitted to Cal-ID for analysis prior to minor's arrest on February 12, 2015. The police report noted minor was arrested for " 'possession of some of the property stolen during the burglary.' " When asked whether he asked the district attorney to analyze the fingerprints prior to the filing of Petition 1, Corporal Cadenhead stated: "The request is made automatically. When the prints are taken, they're submitted to Riverside Cal-ID with a request for analysis. That happens at the time of the report, and that's independent of anything else that would occur." Corporal Cadenhead acknowledged that he did not ask the district attorney to hold off on the filing of Petition 1 until he could confirm the fingerprint analysis. When asked whether he "can conduct an investigation and have a fingerprint analysis done immediately if so decided," Corporal Cadenhead responded, "That would be on

a . . . separate type of case. There would be no priority processing attached to a property crime like this." On June 3, 2015, Cal-ID confirmed that the fingerprints found at Peggy and Wayne's burglarized home had been left by minor.

On September 9, 2015, minor filed a motion to dismiss Petition 2, arguing the burglary charge was barred under section 654's prohibition against multiple prosecutions for offenses committed within a single course of conduct. Minor contended that, under the "multiple prosecution" test articulated in *Kellett*, *supra*, 63 Cal.2d 822, 825, the district attorney had a duty to join the burglary offense in Petition 1. The People filed an opposition on September 16, 2015, arguing prosecution of Petition 2 for the burglary offense was not barred by *Kellett* because the allegations did not arise out of a single course of conduct within the meaning of section 654. The People further maintained that even if section 654 applied, *Kellett* does not bar prosecution of the burglary offense because the People did not have sufficient evidence to prosecute minor on the burglary charge when minor admitted to the receiving stolen property offense alleged in Petition 1.

A hearing on minor's motion was held on September 24 and October 8, 2015. Following argument, the juvenile court granted minor's motion to dismiss, finding the prosecutor was aware of, or should have been aware of, "more than one offense in which the same course of conduct played a significant part in the case at bar." The court thereafter pointed to facts supporting its decision.

On November 17, 2015, the People filed a timely notice of appeal.

II

DISCUSSION

The People argue the juvenile court erred in granting minor's motion to dismiss the burglary petition pursuant to section 654.

Section 654, subdivision (a), provides, in relevant part: "An acquittal or conviction and sentence under any one [provision of law] bars a prosecution for the same act or omission under any other." This bar against multiple prosecutions may apply even when "the same act" is one of several physical acts forming the same course of conduct charged in a prior prosecution. (*Kellett, supra,* 63 Cal.2d at p. 827.) In *Kellett,* our Supreme Court held that when "the prosecution is or should be aware of more than one offense in which the same act or course of conduct plays a significant part, all such offenses must be prosecuted in a single proceeding unless joinder is prohibited or severance permitted for good cause. Failure to unite all such offenses will result in a bar to subsequent prosecution of any offense omitted if the initial proceedings culminate in either acquittal or conviction and sentence." (*Ibid*., fn. omitted.)

The purpose of this bar is to prevent the needless harassment and waste of resources that may result from multiple prosecutions for the same act or course of conduct. "If needless harassment and the waste of public funds are to be avoided, some acts that are divisible for the purpose of punishment must be regarded as being too interrelated to permit their being prosecuted successively." (*Kellett, supra,* 63 Cal.2d at p. 827.) Furthermore, the bar on multiple prosecutions sweeps more broadly than the

prohibition on multiple punishments under section 654: "When there is a course of conduct involving several physical acts, the actor's intent or objective and the number of victims involved, which are crucial in determining the permissible punishment, may be immaterial when successive prosecutions are attempted." (*Kellett*, at p. 827; cf. *Neal v. State of California* (1960) 55 Cal.2d 11, 19 [whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor], disapproved on another ground in *People v. Correa* (2012) 54 Cal.4th 331, 341, 344.)

The *Kellett* bar against multiple prosecutions applies to juvenile proceedings. (*In re R.L.* (2009) 170 Cal.App.4th 1339, 1343.) On appeal, we review the trial court's factual determinations under the "deferential substantial evidence test, viewing the evidence in the light most favorable to the People." (*People v. Valli* (2010) 187 Cal.App.4th 786, 794 (*Valli*) [reviewing a motion to dismiss pursuant to section 654's bar on multiple prosecutions].) However, we review de novo whether the trial court properly applied section 654's prohibition on multiple prosecutions. (*Ibid*.)

"The *Kellett* rule applies only where 'the prosecution is or should be aware of more than one offense in which the same act or course of conduct plays a significant part.' " (*Valli*, *supra*, 187 Cal.App.4th at p. 796 [finding the prosecution was aware of the later charged offense at the time the earlier offense was charged].) Thus, as a threshold matter, we must first determine whether the prosecution was or should have been aware, when it filed Petition 1, that the acts or conduct charged later in Petition 2

were a significant part of the same act or course of conduct charged in Petition 1. We then consider whether the acts charged in Petition 1 and Petition 2 were part of the same act or course of conduct under *Kellett*, thereby barring prosecution of Petition 2.

The prosecution filed Petition 1 on February 13, 2015. But the prosecution knew or should have known as of February 2015 that minor had committed the offense in Petition 2, and the prosecution knew or should have known of the connections between them. On February 6, 2015, deputies investigated and determined a burglary had occurred at Peggy and Wayne's home. Six days later, on February 12, 2015, numerous property stolen from the home was found in minor's bedroom. Minor was arrested on February 12, 2015 "for possession of some of the property stolen during the burglary," and latent fingerprints were submitted to Cal-ID upon minor's arrest. Minor's mother informed the deputies that minor had another burglary case in San Bernardino. Minor's story as to how he received the property was suspect. In addition, three months prior to the burglary, Wayne had seen minor casing their Jaguar vehicle and overheard him ask a friend how much he could get for the vehicle. The Jaguar keys were found in minor's bedroom. Peggy also reported that she had seen minor in their neighborhood; that minor had cased their car; and that minor had come up to their front door. Peggy further stated that her neighbor had cameras on his property, and one of them faced their residence. The video showed three males exit a vehicle and enter Peggy's residence. Peggy did not believe minor merely received stolen property but that he was one of the three juveniles involved in burglarizing her home.

At the time minor admitted the allegation of receiving stolen property as alleged in Petition 1 on February 17, 2015, Wayne and Peggy continued to believe minor was one the juveniles who burglarized their home. Indeed, Wayne stated, ". . . I've seen the gentleman before . . . . [¶] . . . [¶] There's a camera. Our neighbors have cameras of them breaking in, and two of them are out there." As the statements made by the homeowners made clear, by that point in time, the prosecution was or should have been well aware of minor's connection to the burglary about six months before Petition 2 was filed. Furthermore, the police were aware of the common facts connecting the possession of stolen property offense to the burglary charged in Petition 2. The homeowners reported seeing minor in their neighborhood casing their car and home prior to the burglary. The neighbor's video surveillance showed three juveniles enter the home and the homeowners believed one of the suspects was minor. And most importantly, police had recovered minor's fingerprints from the burglarized home at some point before Petition 2 was filed. Based on the timing of the offenses, the stolen items recovered in minor's bedroom, the statements made by the homeowners, and the surveillance video, the prosecution was or should have been aware that the receiving stolen property offense was related to the burglary offense charged in Petition 2.[4] Thus, we must examine

[4] At oral argument, the prosecutor argued that the People did not have the victim's statements regarding the surveillance video until after minor admitted the allegations in Petition 1. However, even if the People did not have this evidence prior to minor's admission, there was ample circumstantial evidence tying minor to the burglary.

whether the offenses were part of the same act or course of conduct under *Kellett*, thereby barring prosecution of Petition 2.

Whether the *Kellett* rule applies "must be determined on a case-by-case basis." (*Valli*, *supra*, 187 Cal.App.4th at p. 797.) As the court explained in *Valli*, appellate courts have adopted two different tests to determine whether multiple offenses arise during the same act or course of conduct under *Kellett*. (*Valli*, *supra*, at p. 797.) Under one line of cases, multiple prosecutions are not barred if the offenses were committed at separate times and locations. (*People v. Douglas* (1966) 246 Cal.App.2d 594, 599 (*Douglas*) [no bar to multiple prosecution where each offense had a separate beginning, duration, and end, none of which overlapped]; *People v. Ward* (1973) 30 Cal.App.3d 130, 136 [no bar to multiple prosecution where crimes were committed at different locations, at different times, against different victims, and with different objectives]; *People v. Cuevas* (1996) 51 Cal.App.4th 620, 624 [no bar to multiple prosecution for offenses committed at different times and at different places]; cf. *People v. Britt* (2004) 32 Cal.4th 944, 955 [multiple prosecutions barred where registered sex offender moving from one county to another failed to notify both counties of his change in residence].)

A second version of the test—the evidentiary test—looks to the evidence necessary to prove the offenses. (*People v. Flint* (1975) 51 Cal.App.3d 333 (*Flint*).) "[I]f the evidence needed to prove one offense necessarily supplies proof of the other, [. . .] the two offenses must be prosecuted together, in the interests of preventing needless harassment and waste of public funds." (*People v. Hurtado* (1977) 67 Cal.App.3d 633,

636 (*Hurtado*).) However, "The evidentiary test of *Flint* and *Hurtado* requires more than a trivial overlap of the evidence. Simply using facts from the first prosecution in the subsequent prosecution does not trigger application of *Kellett*." (*Valli*, *supra*, 187 Cal.App.4th at p. 799.)

First, under the evidentiary test, the evidence necessary to prove Petition 1 (receipt of stolen property) was largely similar from that necessary to prove the charge in Petition 2 (burglary). Evidence needed to prove the offense in Petition 1 consisted of evidence showing property was stolen, minor's knowledge the property was stolen, and minor's possession of the stolen property—e.g., minor's admission that he knew the property was stolen—and testimony from the homeowners identifying their stolen property, which was found in minor's bedroom. (*People v. Allen* (1999) 21 Cal.4th 846, 857, fn. 10; *People v. Price* (1991) 1 Cal.4th 324, 464, superseded by statute on other grounds as stated in *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1161-1165.) Evidence needed to prove the residential burglary charged in Petition 2, primarily consisted of: (1) the testimony of the homeowners; (2) the video surveillance video; and (3) minor's fingerprints found in the residence. However, under the circumstances of this case, the fingerprint evidence was not necessary to prove the burglary charge in Petition 2.

The record is clear that there was evidentiary overlap between the two charges and that it was more than trivial. (*Valli*, *supra*, 187 Cal.App.4th at p. 799 [evidentiary overlap must be more than trivial for *Kellett* to apply].) The prosecution had strong evidence to support the burglary charge apart from the fingerprint evidence. The

prosecution could have convicted minor on the burglary offense based on the homeowners' testimony, the video surveillance evidence, minor's statements, and the stolen property recovered from minor's bedroom. On this record, the evidentiary overlap between the charges in the two petitions was not too modest to support a bar on the latter prosecution. Had the offenses been charged together, the prosecution would have introduced the same evidence. We conclude that, under the evidentiary test, *Kellett* did bar the prosecution of Petition 2.

We reach the same conclusion under the time-and-place test described in *Douglas, supra,* 246 Cal.App.2d at page 599. Here, there was substantial evidence to support the court's implicit finding that both offenses were committed during the same course of conduct. (See, e.g., *People v. Allen*, *supra*, 21 Cal.4th at p. 866 ["When . . . a defendant is charged with burglary and with a violation of 496 with respect to property he stole in the burglary, he has plainly been charged with 'two or more offenses connected together in their commission' within the meaning of section 954."]; *People v. Kellert* (1963) 219 Cal.App.2d 57, 62 ["the entry and the taking were parts of a continuous course of conduct motivated by the single objective of theft"]; *People v. McFarland* (1962) 58 Cal.2d 748, 762 ["the entry . . . and the taking . . . were parts of a continuous course of conduct and were motivated by one objective, theft; the burglary, although complete before the theft was committed, was incident to and a means of perpetrating the theft"].) Despite the fact that the receipt of stolen property was discovered on February 12, six days after the February 6 burglary, the offenses were committed within moments of each other with a

single intent and objective and involved the same victims. As soon as minor and his cohorts walked out of the burglarized home with the stolen property, they had violated section 496. (*Williams v. Superior Court* (1978) 81 Cal.App.3d 330, 343 [the crime of receiving stolen property is completed upon taking possession with knowledge that it is stolen]; *People v. Hall* (1998) 67 Cal.App.4th 128, 140 [receiving stolen property complete "at that moment" the defendant rode away in stolen vehicle].) Contrary to the People's suggestion, the fact that minor still had the stolen property from the burglary in his bedroom six days later does not mean the receiving stolen property offense occurred at a different time and place. We conclude that these two offenses were similar in time and space and formed the same course of conduct for purposes of *Kellett*.

The People argue that the *Kellett* rule does not apply where the acts take place at different times or in different locations. But a later California Supreme Court recognizes no such limitations. *People v. Britt*, *supra*, 32 Cal.4th 944 involved a sex offender who moved from El Dorado County to Sacramento County without registering his move in either place. He pleaded no contest in Sacramento County for failing to register there. While these charges were pending, he was charged in El Dorado County with failing to register his move and was found guilty on that charge. The Court of Appeal affirmed, concluding " 'that both prosecutions are permissible because a person necessarily has two separate intents and objectives . . . , and each crime is a separate continuing act that is not so interrelated with the other act as to come within provisions of section 654.' " (*Id*. at p. 950.) The Supreme Court reversed, holding that the defendant's crimes involved a

single course of conduct: one unreported move within the state, and the second prosecution was therefore barred. (*Id*. at pp. 954-955.) So, even though the conduct occurred on separate occasions and in different counties, *Kellett* nevertheless prohibited the successive prosecution.

The People rely on *People v. Martin* (1980) 111 Cal.App.3d 973 (*Martin*), which held *Kellett* did not apply because the separately charged offenses were not based on the same course of conduct and had only minimal evidentiary "overlap." (*Martin*, *supra*, 111 Cal.App.3d at 976-978.) We find this case distinguishable. There, the defendant was arrested for possession of marijuana and of a sawed-off shotgun found in his car after a traffic stop. After he was booked, the police learned the shotgun had been reported stolen. The defendant pled guilty to the misdemeanor weapons and narcotic offenses. An information was then filed charging him with the burglary in which the shotgun was stolen. (*Id*. at p. 976.) It was undisputed the prosecution did not know of his involvement in the burglary when he pled to the misdemeanor charges. (*Id*. at p. 977.) He argued the prosecution should be charged with such knowledge, but the court disagreed because the burglary and the traffic stop were separate incidents as to time, place, and character. (*Id*. at pp. 977-978.) Thus, regardless whether "the same act or course of conduct play[ed] a significant part" in all the charged offenses (*Kellett*, *supra*, 63 Cal.2d at p. 827), *Kellett* did not apply because the prosecutor neither knew nor should have known of all the offenses at the relevant time—a fact which distinguishes *Martin* from our case. (*Martin*, *supra*, at pp. 977-978; see *Kellett*, *supra*, 63 Cal.2d at p. 827.)

Here, the prosecution was aware of, or should have been aware of, the burglary offense as the first case proceeded. In addition, minor's receipt of stolen property and burglary were not separate in time or place, as in *Martin*. Moreover, the overlap in evidence was not minimal—it was substantial in regard to time, location and the factual foundation for the crimes.

For these reasons, we conclude that *Kellett* did bar prosecution of the burglary offense charged in Petition 2.

III

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

MILLER
J.